

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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CITY OF BROOKFIELD, LIBRARY  
EMPLOYEES, LOCAL 20 OF  
WISCONSIN COUNCIL 40,  
AFSCME, AFL-CIO,

Complainant,

vs.

CITY OF BROOKFIELD (LIBRARY),

Respondent.  
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Case XLIX  
No. 31445 MP-1426  
Decision No. 20702-A

Appearances:

Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703 by Mr. Richard V. Graylow, appearing on behalf of the Complainant.

Godfrey, Trump & Hayes, Attorneys at Law, 250 East Wisconsin Avenue, Suite 1200, Milwaukee, Wisconsin 53202, by Mr. Tom E. Hayes, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER

Daniel J. Nielsen, Examiner: City of Brookfield, Library Employees Local 20 of Wisconsin Council 40, AFSCME, AFL-CIO (hereinafter variously referred to as the Union or the Complainant) having on April 13, 1983 filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission (hereinafter referred to as the Commission) wherein it alleged that the City of Brookfield (hereinafter variously referred to as the City or the Respondent) had committed prohibited practices within the meaning of Sections 111.70(3)(a)1 and 3, Municipal Employment Relations Act (hereinafter referred to as MERA) by refusing to grant a requested leave of absence to Christina Helm and thereafter replacing Helm with two part-time, unrepresented employees; and the Commission having on May 25, 1983, appointed Daniel J. Nielsen, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(2)(a) Wisconsin Employment Peace Act (hereinafter referred to as WEPA); and notice of hearing having been served upon the parties pursuant to Section 111.07(2)(a) WEPA, on May 25, 1983; and the parties having subsequently requested and received several postponements of the hearing date; and the City having, on August 15, 1983, filed an answer wherein it denied having committed any prohibited practices; and a hearing having been held on the complaint on October 7, 1983 in Brookfield, Wisconsin, a transcript of which was received by the Examiner and the parties on October 24, 1983; and the parties having submitted post-hearing briefs and reply briefs, the last of which was received by the Examiner on January 26, 1984; and the Examiner, having considered the testimony, evidence, exhibits and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the City of Brookfield is a municipal corporation providing general governmental services to the people of Brookfield, Wisconsin; that the City maintains its principal offices at 2000 North Calhoun Road, Brookfield, Wisconsin 53005; that among the services provided by the City is the operation of a public library at 1900 Calhoun Road, Brookfield, Wisconsin; that in the operation of said library, the City employs professional and non-professional staff; that William Mitchell has, at all times material herein, been the Mayor of the City; that Sonia Biellemer has, at all times material herein, been the Director of Library Services for the City; and that Mitchell and Biellemer are agents of the City in their official capacities.

2. That the City of Brookfield, Library Employees, Local 20 of Wisconsin Council 40, AFSCME, AFL-CIO is a labor organization having its principal offices c/o Richard Abelson, 2216 Allen Lane, Waukesha, Wisconsin 53186; that the Union

is the certified exclusive bargaining representative of all professional and non-professional employees of the City of Brookfield Public Library excluding supervisory, managerial, confidential, part-time employees working twenty (20) hours or less per week, seasonal, temporary/casual employees and volunteers, pursuant to the certification issued by the Commission in City of Brookfield (Library), Dec. No. 18673, (WERC, 6/81); and that the aforementioned Richard Abelson is the Business Representative for the Union.

3. That, subsequent to the certification of the Union as exclusive bargaining representative, the Union and the City engaged in negotiations over an initial labor agreement; that these negotiations were conducted from June of 1981 through June 13, 1982 at which time the Union filed a petition for Mediation/Arbitration pursuant to Section 111.70(4)(cm)6, MERA; that negotiations continued after the filing of the Mediation/Arbitration petition until at least April of 1983; that the Union's bargaining team in the negotiations with the City was comprised of Christina Helm, an Adult Services Librarian at the Brookfield Public Library, and Elaine Farnham, a Librarian's Assistant at the Brookfield Public Library; and that, at all material times, there has been no collective bargaining agreement in existence between the City and the Union.

4. That in May of 1981 the City of Brookfield undertook to convert its library from a manually controlled information system to an automated information system; that the computerized system became functional in February of 1982; that part of the process of converting to an automated system involved transferring information from the library's card catalogs to the computer's data banks through keypunching; that the transferral of this information substantially increased the work load in the Brookfield Public Library; that this increase in the workload resulted in backlogs of data-entry work, cataloging, and corrections to be made in previous entries; that this backlog developed after May 1981 and persisted until June of 1983; that the backlog was particularly pronounced in the last six months of 1982; that, in November, 1982, there were several hundred books awaiting cataloging and several hundred more awaiting data-entry to the computerized system; that at that time, there were approximately 1400 corrections to be made in data already entered into the system; that the elimination of these backlogs in 1983 was primarily due to the acquisition of several management programs for collection development; that these programs had initially been scheduled to go "on-line" in 1982; and that the introduction of these programs were delayed by technical problems in the development of the software.

5. That the staffing in the Brookfield Public Library from January of 1982 through May of 1982 consisted of nine full-time employees and nine part-time employees; and that layoffs in June and July, 1982 resulted in a reduction in the library staff to eight full-time employees and three part-time employees.

6. That Bielmeier instructed library employees to use all of their accrued vacation prior to January 1, 1983; that Bielmeier's instructions were intended to allow a concerted effort by the full staff to reduce the backlog in January, February and March of 1983; that vacation requests were required to be submitted in September 1982; that Christina Helms submitted a request for 5 1/2 days vacation to be taken in late December of 1982; that Helm's request was granted; and that Margaret Rossetto, a Professional Librarian, was granted her vacation request to be taken during most of the month of December.

7. That the City of Brookfield Public Library had in effect, at all material times, a set of personnel guidelines; that included among these guidelines was the following:

"LEAVE OF ABSENCE

A leave of absence without pay will be granted for acceptable reasons after the approval of the Library Director. Vacations, sick leave and holiday benefits will be discontinued during a leave of absence. Normally, leave will be granted not to exceed 60 days. Requests for a leave of absence must be submitted in writing to the Library Director at least 15 days prior to the beginning of the leave of absence.

Blue Cross/Blue Shield and Group Life Insurance coverage may be continued during an extended leave of absence, but the

individual premium in each case must be paid by the employees.";

that Kerstin Kusic was granted a twenty-hour leave of absence in 1977; that Erna Stegelmann was granted a nine day unpaid leave of absence in 1978 for emergency leave; that Beth Grimstad was granted a sixteen hour unpaid leave of absence in 1982; that Grimstad, Kusic and Stegelmann were part-time employees not entitled to vacation; that Margaret Rossetto was granted a three week unpaid leave of absence in 1978 for a study trip to Europe; that Darcy Neuenfeldt was granted an unpaid maternity leave from November 22, 1982 through January 26, 1983; and that Ellen Hetrick requested an unpaid leave of absence in 1978, which was refused.

8. That Christina Helm was first employed by the Brookfield Public Library as a part-time employee in 1976; that, in February of 1977, Helm became a full-time employee in the position of Young Adult Services Coordinator; that in 1982, Helm was employed as a Professional Librarian doing reference work, cataloging, conducting programs for young adults and pre-schoolers, and doing some data-entry keypunching work for the computerized system in the library; that Helm catalogued books at the rate of approximately 19 per day during the period of July 9, 1982 through November 8, 1982; that commencing in late November of 1982, Helm was assigned to devote a significantly higher portion of her time doing data-entry keypunching work than had previously been the case; and the Helm was a competent professional librarian.

9. That Helm and her husband were childless and had, since the time of their marriage, been seeking to adopt a child; that they had been unsuccessful in their attempts to be placed on the adoption registration rolls in the State of Wisconsin; that, on November 11, 1982, Helm's mother-in-law informed her that there was the possibility of adopting a newborn baby in Iowa; that, on the weekend of November 13 and 14, 1982, Helm and her husband travelled to Iowa to investigate their prospects for adopting the child and to secure legal counsel; that they confirmed the fact that the child was available for adoption, and that they were likely to be successful in their bid to adopt the child; and that Helm returned to Wisconsin on Sunday, November 14.

10. That Helm reported to work on Monday, November 15; that Helm spoke to Sonia Bielmeier when Bielmeier came into the library at approximately 12:30 p.m. and informed her of the possibility that she would be adopting a child; that Helm requested an unpaid leave of absence for 15 1/2 days in addition to her scheduled vacation of 5 1/2 days; that the requested leave was to begin on November 29, 1982 and conclude at the beginning of the work day on January 3, 1983; that Bielmeier told Helm that she would have to consult with the Mayor before granting the leave; that the following day, November 16, 1982, Bielmeier refused the request for an unpaid leave of absence citing the workload in the library; that Bielmeier further informed her that if she took the leave without approval she would be terminated; that Bielmeier told Helm that she hoped Helm understood that the refusal of the leave was not Bielmeier's doing; that Helm replied that she would like to think that it was not; and that Bielmeier responded to the effect that "after all these years I should hope you would know that it isn't."

11. That, prior to her request for unpaid leave, Helm's workload when not assigned to a reference desk, was primarily cataloging new books; that, immediately after her request for an unpaid leave of absence, Bielmeier assigned Helm to clerical keypunching; that prior to the assignment of Helm, Mary Wegener, the Technical Services Librarian, had been primarily involved in the keypunching operation.

12. That Bielmeier agreed to allow Helm to take the 5 1/2 days of accrued vacation time originally scheduled for late December beginning on November 29, 1982 and ending at 1:00 on December 6, 1982; that Bielmeier, Helm, Margaret Rossetto, and Richard Abelson met on November 22, 1982; that Bielmeier confirmed the approval of Helm's vacation for the period between November 29 and December 6; that Bielmeier inquired as to Helm's plans after the end of her vacation; that Helm replied that she was unsure of her plans but that she wished to retain her employee status with the City; that, on November 23, 1982, Helm sent the following letter to Bielmeier:

Dear Sonia:

This is to confirm that on Monday, November 15, 1982, I requested an unpaid leave of absence for child-rearing purposes related to the adoption of my daughter. I requested that the leave was to commence on November 29, 1982, at 8:30 a.m., and conclude at 8:30 a.m. January 3, 1983, inclusive of 5 1/2 days of accrued vacation. On Tuesday, November 16, 1982, you informed me that my request for leave without pay had been denied and that I could take my vacation starting on November 29, 1982. You further stated that if I took any leave without pay, I would be terminated.

On November 22, 1982, at a meeting initiated by you, attended by Richard Abelson, Margaret Rossetto, yourself, and the undersigned, you again confirmed my authorization to take vacation days commencing on November 29, 1982. At this meeting, you asked if I had made any decisions about my future status. I replied that I intended to retain my employee status.

Please advise me by Friday, November 26, 1982, if the above summary accurately depicts the situation.

Further, I am again requesting that you reconsider the granting of my leave of absence without pay. After consulting with legal counsel, I understand that leaves without pay for child-rearing purposes including those surrounding the adoption of a child must be granted in the same manner as other leaves of absence without pay to Library personnel. I need not remind you that Margaret Rossetto, Erna Stegelmann and Kerstin Kusic have all been allowed leaves of absence without pay for reasons other than maternity including personal travel.

I will expect your response on this matter by Friday, November 26, 1982, as well. Thank you for your cooperation.

Sincerely,

Christina M. Helm

cc: Richard Abelson  
Richard Graylow, Attorney, Lawton & Cates, 110 E. Main  
Street, Madison, WI 53703;

and that Bielmeier responded by a letter dated 11/24/82 as follows:

11-24-82

Dear Ms. Helm:

This repeats my oral denial of your oral and written request of November 23, 1982 for leave of absence.

We regret that our work load in the Library does not allow approval of your application for a leave of absence.

You are fully aware that the Library is struggling to handle the transition to computerization with a reduced staff. Part of the problem is the work that was deferred so that one time assignments could be undertaken to put computerization in operation. This accumulation of deferred work could be disposed of in the coming months but the burden for the next few months is heavier than it would be ordinarily and this makes this period an extremely critical one. The Library needs the services of each member of its staff.

You have some of your vacation accumulation available to you. We will expect that you will utilize this vacation but that after you have used your entitlement, you will return to work. If you do not so report to work, we will conclude that you are unavailable for work for personal reasons and that you have elected to terminate your employment.

Sincerely,

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Sonia Bielmeier, Director of Library Services

Copies: Hon. Mayor William A. Mitchell  
Mr. Thomas Hayes, Attorney

12. That, within a week of November 16, 1982, following Bielmeier's oral denial of Helm's request for unpaid leave of absence, Bielmeier placed an advertisement in the Milwaukee Journal seeking applicants for part-time professional positions with the Brookfield Public Library.

13. That Christina Helm left for Iowa on November 26, 1982; that she stayed in Iowa with her newborn adopted daughter until December 9, 1982; that Sonia Bielmeier called Helm's residence on December 6, 1982, the last day of her vacation; that there was no answer, that on December 7, 1982 Bielmeier again called Helm's residence and spoke to her husband who informed her that Helm was still in Iowa; that on December 10, 1982 Helm appeared in the library at approximately 4:00 p.m. with her child; that Helm requested her paycheck; that Bielmeier spoke with Roy Weed, Deputy Comptroller for the City of Brookfield, who informed her that Helm had requested her check at the Comptroller's office; he further informed her that the check would be mailed on the following Monday and would include 11/12's of the vacation that Helm had earned for 1983; that Bielmeier had informed Helm of these facts; and that this was the extent of the conversation between Bielmeier and Helm on that occasion.

14. That one of Roy Weed's duties as Deputy Comptroller was to personally deliver paychecks to City employees every two weeks on a Friday afternoon; that Weed delivered paychecks to the employees of the City of Brookfield Public Library during the fall of 1981; and that on one occasion in the Fall of 1981, Weed had a conversation with Chris Helm and Mary Wegener in the course of which he informed them that Mayor Mitchell had stated his intention to get rid of Helm and Elaine Farnham, the other member of the Union's bargaining committee, because of their union activities.

15. That subsequent to the termination of Chris Helm, Bielmeier contacted Donell Nash, a laid off employee, about the possibility of replacing Helm; that Nash refused on the basis of a lack of qualifications and a lack of interest; that on December 21, 1982 the public library employed Sue Kendall as a part-time Professional Librarian to perform duties previously performed by Helm; that on January 3, 1983, the public library employed another part-time Professional Librarian, Mary Carian, to perform similar duties; that neither of these part-time employees had current cataloging experience; that both required training by Mary Wegener; and that neither of the part-time employees hired to replace Helm worked sufficient hours to be included in the bargaining unit represented by Local 20.

16. That Christina Helm, through her membership on the Union's bargaining committee, was assisting a labor organization and engaging in collective bargaining on behalf of fellow employees; that the City of Brookfield was aware of Helm's membership on the bargaining committee and her activities on behalf of her fellow employees; that the City of Brookfield was hostile to Helm's activities on behalf of her fellow employees; that it was reasonably foreseeable that refusal to grant Helm's requested leave of absence would lead to her failure to report to work upon expiration of her vacation; that the City did, in fact, foresee such a result; and that the City's refusal to grant Helm's requested unpaid leave of absence in November of 1982 was in part motivated by hostility towards Helm's activities on behalf of the Union.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

### CONCLUSIONS OF LAW

1. That the City of Brookfield is a municipal employer within the meaning of Section 111.70(1)(a), MERA.

2. That Christina Helm was, at all relevant times, a municipal employee within the meaning of Section 111.70(1)(b), MERA.

3. That the City of Brookfield, Library Employees, Local 20 of Wisconsin Council 40, AFSCME, AFL-CIO, is a labor organization within the meaning of Section 111.70(1)(j); that Local 20 is the exclusive bargaining representative for employees of the City of Brookfield Library as set forth in Finding of Fact No. 2, supra; and that Local 20 is a party in interest, within the meaning of Section 111.07(2)(a), WEPA, to the dispute over Christina Helm's termination.

4. That Christina Helm was engaged in lawful concerted activity within the meaning of Section 111.70(2), MERA, in serving as a member of the Union's bargaining committee in the years 1981 and 1982; that City of Brookfield violated Section 111.70(3)(a)3, MERA, by discriminating against Helm with respect to her terms of employment and tenure of employment when it refused to grant her request for leave of absence in November of 1982; and that the City of Brookfield thereby committed a derivative violation of Section 111.70(3)(a)1, MERA, by interfering with the rights of municipal employees to engage in lawful concerted activity.

5. That the City of Brookfield did not commit an independent violation of Section 111.70(3)(a)1, MERA, when it employed two part-time employees not included in the collective bargaining unit to replace Helm following her termination.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

#### ORDER 1/

IT IS HEREBY ordered that the Respondent, City of Brookfield, its officers and agent shall immediately:

- 1) Cease and desist from discriminating against Christina Helm on the basis of her exercise of protected rights, with regard to hiring, tenure and terms and conditions of employment; and

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

- 2) Take the following affirmative actions which the Examiner deems necessary to effectuate the policies of MERA:
- a. Immediately offer Christina Helm reinstatement to the position that she held with the Brookfield Public Library as of November 26, 1982, together with full seniority; and
  - b. Make Christina Helm whole for all losses suffered by virtue of her termination by paying to her an amount equal to all wages and benefits which she would have received but for her termination during the period from January 3, 1983 through the date of compliance with this Order, less any compensation she has received during that period which she would not have received had she not been terminated; and
  - c. Pay to Christina Helm interest on the amount of money ordered paid in subsection 2(b) of this Order at the statutory rate of 12% per annum, said interest beginning on January 3, 1983 and ending with the date of compliance with this Order; and
  - d. Notify all employees employed in the bargaining unit that it will not discriminate against any employee with respect to hiring, tenure and other terms and conditions of employment because of any employee's exercise of protected rights; and that it will not interfere with the exercise of such rights, by prominently posting the notice attached hereto as "Appendix "A""; and
  - e. Notify the Wisconsin Employment Relations Commission in writing within twenty days of the date of this Order regarding what step it has taken to comply with the Order.

Dated at Madison Wisconsin this 13<sup>th</sup> day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Daniel J. Nielsen, Examiner

APPENDIX "A"

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

1. We will immediately offer to reinstate Christina Helm to her position as a Professional Librarian with the City of Brookfield Public Library, and will pay to her an amount equal to the wages and benefits which she would have received had her employment not been terminated, together with interest thereon, less any amounts she earned which she would not have earned had she not been terminated.

2. We will not discriminate against Christina Helm, nor any other employee, for the exercise of the protected rights of self-organization, forming, joining or assisting labor organizations, bargaining collectively through representatives of their own choosing, or engaging in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection, or for refraining from such activities. Further, we will not interfere with the exercise of such rights, nor restrain nor coerce any employee in the exercise of such rights.

CITY OF BROOKFIELD

By: \_\_\_\_\_

Dated this \_\_\_\_ day of \_\_\_\_\_, 1984.

THIS NOTICE MUST BE POSTED FOR THIRTY DAYS FROM THE DATE HERETO AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.



MEMORANDUM ACCOMPANYING FINDINGS  
OF FACT, CONCLUSIONS OF LAW AND ORDER

I. UNDISPUTED BACKGROUND

Christina Helm was, until December of 1982, a Professional Librarian with the Brookfield Public Library. Since its conversion to automation in 1980, the library had been plagued with large backlogs of work in transferring information to the computer, correcting mistakes made in the computer entries and cataloging newly acquired books. This condition persisted until the summer of 1983.

While employed at the library, Helm was active in the formation of an employees' union affiliated with Wisconsin Council 40 of AFSCME. She served as one of two members on the union's bargaining team for negotiations over an initial contract with the City. The other member of the bargaining team was Elaine Farnham, a Librarian's Assistant. Farnham was laid off in July of 1982 as part of a general reduction in force.

In November of 1982, Helm and her husband became aware of an immediate adoption opportunity in Iowa. They had been unsuccessfully seeking to adopt for several years. They travelled to Iowa on the next weekend and confirmed that they stood a good chance of obtaining the child. When Helm returned to work on the following Monday, November 15, she informed the Director of the library, Sonia Bielmeier, of the possibility that she would be adopting and requested an unpaid leave of 15 1/2 days to attend to the child and the technicalities of the adoption. Taken in conjunction with her vacation the leave would have extended from November 29 through January 3, 1983. Bielmeier told her she would check with the City Hall about the leave. On the following day, Bielmeier informed Helm that her leave request was denied. Arrangements were made for Helm to take her days of vacation from November 29 through December 6, but she was informed that failure to return to work after the expiration of her vacation would be considered a resignation. This was confirmed at a meeting on November 23, 1982 attended by Bielmeier, Margaret Rossetto, Helm and Richard Abelson, the Business Agent for AFSCME. Helm took the position that denial of her request was unjustified in light of unpaid leaves granted to other employees in the past and the extended leave granted another employee for childbearing. She further stated her intention, both at the meeting, and in a subsequent confirming letter, to retain her "employee status" at the library.

Helm left for Iowa on November 26. Her vacation ended on December 6 at 1:00 p.m. She did not return to Wisconsin until December 9. On December 10, she went to the library to inquire after her paycheck. She was told by Bielmeier that her check, together with 11/12's of her pay for earned vacation, would be mailed to her.

The library hired two part-time Professional Librarians to replace Helm. The applicants had responded to an advertisement placed in the Milwaukee papers within a few days of Helm's request for leave. Since the recognition of the Union excludes part-time employees working 20 hours or less, the replacement employees are not members of the bargaining unit. The instant complaint was thereafter filed.

Other facts as necessary will be set forth in the discussion.

II. ARGUMENTS OF THE PARTIES

A. The Complainant.

The Complainant takes the position that Helm was discriminated against because of her membership on the Union's bargaining committee. The Union maintains that the Mayor instructed Bielmeier to refuse Helm's request for leave understanding that she would then be forced to choose between adopting a child and failing to report for work. The Union notes that requests for unpaid leave have been regularly granted in the past and that another employee, Darcy Nuenfeldt, was on leave without pay for childbearing when Helm's request was made. Leaves have been granted for less compelling reasons than those which motivated Helm,

including vacation and foreign travel. The City's stated reason for denying the requested leave - the backlog of work in the library - is characterized as mere pretext by the Union. The Union argues that the backlog was a longstanding problem and that Helm's absence for some 20 days would have had little impact on reducing it. The Union further asserts that Helm would have been able to effectively eliminate or at least drastically reduce the backlog of books to be catalogued before her leave was to commence, had she not been transferred to keypunching immediately after her request for leave. Had the City been truly concerned about reducing the backlog, they hardly would have terminated one of their most experienced and valuable librarians and replaced her with two part-time employees, neither of whom had experience with the City's system, neither of whom had current cataloging experience and one of whom did not start until the day Helm's leave would have expired.

The Union asserts that the City's true motive was animus. This, the Union argues, is demonstrated by the Mayor's threat to get Helm and Elaine Farnham and the fact the Beilmeier's reaction to the adoption changed from a very positive response to a denial of the leave request in the space of one day, with the lone intervening event being the meeting with Mayor Mitchell.

In addition to discriminating against Helm, the Union submits that the City interfered with the employee's right to engage in collective bargaining activity by first laying off Farnham and then constructively discharging Helm, thus eliminating both members of the bargaining committee. Without a committee, it is difficult if not impossible to bargain. The Union cites prior Commission cases 2/ for the proposition that the actions of an employer must only have a reasonable tendency to interfere with concerted activity in order to violate Section 111.70(3)(a)1, MERA. Without regard to intent, the City's elimination of the sole remaining member of the bargaining committee cannot avoid interfering with bargaining and thus, is a violation of MERA.

The Union accordingly requests that the Examiner reinstate Helm to her former position with full backpay and benefits, enter a cease and desist order prohibiting the City from further discriminating against or interfering with bargaining unit members, and grant other relief as appropriate.

#### B. The Respondent.

The City takes the position that the denial of Helm's request for leave was premised solely upon legitimate business concerns. The library staff had been reduced in 1982 because of layoffs. The remaining personnel were faced with a large backlog of work. Moreover, the absence of Darcy Nuenfeldt and the scheduled vacations of other library personnel in late November and December of 1982 meant that the library would be short-handed during those months. This situation made it impossible for the library to both grant Helm's request for leave and provide necessary services to the citizens of Brookfield. The impending "motherhood" of Helm presented the City with a legitimate concern that she might not ever return to full-time employment, given the demands of caring for an infant, and granting the leave would simply have denied the City her services for a month and have delayed their search for a replacement employee. Helm made no effort to reassure Beilmeier that she would return to full-time employment, other than her vague wish to "retain her employee status." Thus, the City had both a concrete need for Helm's services during the time of her requested leave and a legitimate concern over future staffing if it granted the leave and Helm did not return.

As to the Union's assertion of animus, the City flatly denies that Mayor Mitchell ever threatened to "get" Farnham and Helm or that Weed ever made such a statement to Farnham, Helm or Wegener. The City suggests that, had such a statement ever been made, it would have surfaced in a previous prohibited practice complaint proceeding involving the layoff of Farnham. Further, the City asserts that Weed, as Deputy Comptroller, is not a managerial employee and does not speak for management, thus rendering any comments he may have made less than signifi-

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2/ Brown County, Dec. No. 17258-A, (Houlihan, 8/80); City of Evansville, Dec. No. 9440-C (WERC, 3/71); City of Waukesha, Dec. No. 11486 (WERC, 12/72); Fennimore Jt. School District, Dec. No. 12790-A (Malamud, 1/78); Winnebago County, Dec. No. 16930-A (Davis, 8/79).

cant in demonstrating animus by the City. Finally, the City argues that the Mayor would be unlikely to confide in Weed, a relatively junior member of the administrative staff with whom he had little contact. For these reasons, the City urges that the testimony of Mayor Mitchell and Weed be credited over the testimony of Farnham and Wegener.

The City dismisses the allegation of interference as being premised upon the idea that an Employer must structure its workforce according to the wishes of the Union - a notion that the Employer dismisses as unsupported by law or common sense. The Employer notes that the library staff is sufficiently small that any action taken regarding an employee is likely to impact on official of the Union. Activity on behalf of the Union does not so insulate an employee as to prevent the Employer from making fair and rational decisions on the management of its work force, even if these decisions inconvenience the Union.

The City's decision to deny Helm's leave, and its subsequent hiring of two part-time, non-union employees to replace her, do not support a finding of interference with concerted activities. Accordingly, the Respondent asked that the complaint be dismissed in its entirety.

### III. DISCUSSION

#### A. Discrimination

A municipal employer violates the Municipal Employment Relations Act where it takes actions designed to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other term or condition of employment." (Sec. 111.70(3)(a)3, MERA). Under Wisconsin law, it is well established that anti-union animus need not be the employer's primary motive in order for a discriminatory act to contravene the statute. If animus forms any part of the decision to deny a benefit or impose a sanction, it does not matter that the employer may have had other, legitimate, grounds for its action. 3/ Thus, in the instant case, if it is established that the denial of Helm's request for unpaid leave was in any part motivated by her Union activities, the Examiner is obliged to grant relief in the form of remedial and affirmative orders.

In order to prevail on a complaint of discrimination under Sec. 111.70(3)(a)3, the Complainant must prove, by a clear and satisfactory preponderance of the evidence 4/ that:

- 1) Helm was engaged in protected activities; and
- 2) The Respondent had knowledge of those activities; and
- 3) The Respondent was hostile toward those activities; and
- 4) The denial of Helm's request for leave was, at least in part, motivated by the Respondent's hostility toward Helm's participation in protected activities 5/

Evidence of illegal motive may be direct (overt statements of hostility) or, as is usually the case, inferred from the circumstances surrounding the discriminatory act (timing, 6/ or a finding that the explanation proffered by the Employer is pretextual. 7/)

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3/ ". . . an employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid grounds exist for firing him." Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540 (1967), at page 562 (hereinafter referred to as Muskego-Norway).

4/ Sec. 111.07(3), WEPA (made applicable to proceedings under MERA by Sec. 111.70(4)(a), MERA).

5/ See, Town of Salem, Dec. No. 18812-A (WERC, 2/82), at page 9, and cases cited therein at footnote 15.

6/ Town of Salem, supra, at page 10; Fennimore Community Schools, Dec. No. 18811-A (Malamud, 1/83) at page 17.

7/ City of Racine (Police Dept.), Dec. No. 17605-B (WERC, 2/81), at pages 28-29; Town of Mercer, Dec. No. 14783-A (Greco, 3/77), at pages 6-7; Fennimore Community Schools, supra, at page 17.

### 1. Protected Activity

There is no dispute that Helm engaged in lawful, concerted activity when she served as a member of the Union's bargaining team in the lengthy negotiations with the City over an initial labor contract.

### 2. Employer Knowledge

There is no dispute over the Employer's knowledge of Helm's protected activity. Obviously, the Employer was aware of her membership on the Union's bargaining team.

### 3. Hostility

Generally, the separation of "hostility" and "motivation" into two distinct elements is rather artificial. Only in rare instances will there be evidence of hostility which does not overlap those items of proof which also establish motivation. Here, however, there is an allegation that the Mayor made directly hostile remarks which were repeated to Helm and two other union members by another employe, Roy Weed. Weed and the Mayor flatly denied that any such statements were made.

In resolving questions of credibility, the Examiner considers the demeanor of witnesses, the inherent probability of the competing versions, material inconsistencies in the record as a whole, and the incentive for each of the witnesses to present testimony favoring one version over another. The major inconsistencies in the testimony are dealt with expressly in the remainder of this rationale. Minor inconsistencies, while not expressly discussed, have been similarly analyzed and resolved in the process of formulating Findings of Fact.

#### a. Helm's Testimony

Helm testified that Weed told her, Elaine Farnham and Mary Wegener that Mayor Mitchell had stated his intent to get rid of Farnham and Helm. Helm stated that Weed's comments were made in the course of a conversation while Weed was delivering paychecks at the library on a Friday afternoon in Autumn of 1981. Helm did not recall any other details of the conversation.

#### b. Wegener's Testimony

Mary Wegener testified that Weed stated that Mayor Mitchell wanted to get rid of Farnham and Helm because of their activities as members of the Union's negotiating team. Wegener recalled the conversation as taking place in the workroom of the library on a Friday afternoon in the Fall of 1981. She was not sure whether Farnham was present and did not recall any other details of the conversation.

#### c. Weed's Testimony

Weed testified that Mayor Mitchell had never expressed any sentiments against Farnham or Helm to him and that he had never told either Farnham or Helm that the Mayor was out to get them. He confirmed that he often spoke with Farnham, Helm and Wegener when he delivered checks to the library. The only discussion Weed had with Helm and Farnham regarding retaliation for union activities were on those occasions when they expressed to him their personal opinions that the City was trying to get rid of them.

#### d. Mitchell's Testimony

Mitchell denied ever making any comments to Weed suggesting that he had an interest in getting rid of Farnham or Helm.

There is no inherent inconsistency in the testimony presented which might resolve the credibility issue. The incident at issue was isolated from other material events and either version would therefore meld equally well with the remainder of the record. Weed testified that he did not regularly have contact with the Mayor, except during budget preparation when he saw him on a daily basis. The significance of this supposed lack of access is substantially reduced by the fact that budgets are prepared in the Fall, which is when the statement was

allegedly made. While the City argues that the Mayor would hardly have made such a potentially damning statement to a low level underling, the record does not establish what the personal relationship might have been between the two men, nor does it automatically follow that the Mayor would only reveal these sentiments to select top administrators. It is equally plausible to suppose that a person in a position of power might feel most comfortable sharing these thoughts with a subordinate whose relative lack of standing would make him hesitant to ever reveal them. Thus there is nothing inherently implausible in either version.

With regard to the demeanor of the witnesses, Helm, Wegener and Mitchell all testified confidently and were at ease on the stand. Wegener, in particular, was impressively certain of her testimony on this point and direct and thoughtful in her responses to questions posed by counsel. Weed appeared to be nervous while on the stand and was somewhat less than direct in his responses to Complainant's questions. 8/ Weed's demeanor while testifying was such that, overall, the Examiner attaches less weight to his testimony than to that of the other three witnesses who testified to this point.

As to the likelihood that any of these witnesses would have reason to recast events to favor one version or the other, three of the witnesses have obvious motives. Helm stands to regain her job and a substantial amount of backpay if animus is shown to have lead to her involuntary removal from the library staff. The mayor, for his part, would plainly have an interest in denying participation in a critical element of a prohibited practice, particularly where he is alleged to have been the primary actor throughout. Weed is still employed by the City in a position subordinate to the mayor. His comments to Helm and Wegener, if such were actually made, would represent an indiscretion of monumental proportions. He would therefore have a reasonable concern about his own professional career with the City which might cause him to deny making the statement. Wegener, alone among the witnesses, has no apparent interest in the outcome of the case.

Wegener is no longer employed by the City of Brookfield, having left for a better job in February of 1983. The record does not indicate any relationship between Helm and Wegener other than that of co-worker. Neither is there any indication that Wegener was particularly active in the organization or administration of the Union at the Brookfield Public Library. The comments that Weed is said to have made have no personal impact on Wegener, as she was not among the employees threatened. The City has suggested no motive whatsoever for Wegener to lie and the Examiner can find none in the record. Contrary to the City's assertion that she was vague about the incident, Wegener's testimony was absolutely certain as to the essence of Weed's comments. Moreover, Wegener's testimony on the size of the backlog in the library at the time of Helm's requested leave is more supportive of the City's view that the backlog was very substantial than the Union's assertion that it was easily manageable. Thus Wegener's objectivity about the circumstances surrounding Helm's case is more firmly established than that of any of the other three witnesses on this point. Based upon Wegener's demeanor, lack of any motive to deceive and the overall objectivity of her testimony, the Examiner credits her testimony (and, to the extent that it parallels Wegener's, Helm's testimony) over that of Mitchell and Weed and finds that Mayor Mitchell told Roy Weed in Fall of 1981 that he wanted to get rid of Elaine Farnham and Christina Helm because of their Union activity. 9/

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8/ Transcript, page 60, folios 10-24, (Testimony of Roy Weed).

9/ The Respondent argues that this statement, if made, should have surfaced in a previous prohibited practice complaint case over the layoff of Farnham. City of Brookfield (Library), Dec. No. 20691 (Bielarczyk, 5/83), Revised and affirmed, Dec. No. 20691-A (WERC, 2/84). Neither party requested during the hearing that the record of that case be administratively noticed by the Examiner in the instant case, with the exception of Complainant's request at hearing that the Examiner note specific portions of the Mayor's testimony regarding automation of the Library (Transcript, pages 54 and 55). Neither Helm, Wegener nor Abelson was questioned about this point during cross-examination by Respondent's counsel in the course of this hearing and the argument was raised for the first time in the Respondent's brief. The Respondent had ample opportunity to make a record on this point, allowing

(Footnote 9 continued on Page 14).

The Respondent argues that, even if the Examiner concludes that Weed did make the remarks attributed to him, they are of no significance since Weed is not a supervisory employee and does not speak for the City. The record does not establish whether Weed is a supervisory employee, but the point is not important. The issue is not whether Weed has anti-union animus, but rather whether the Mayor had anti-union animus. The City's argument seems to be that Weed's statement may have been his own invention, attributed by him to the Mayor, but actually reflecting his own personal views. There is nothing in the record to support this line of argument. The Examiner has determined that Weed made the statement attributed to him by Wegener and Helm. It is more reasonable to conclude that Weed's original statement was accurate than to speculate that Weed for some reason made up the comment that he attributed to the Mayor and then repeated it as a threat to two union activists.

On the basis of the foregoing, and the discussion of pretext below, 10/ the Examiner finds that the Respondent City, through its mayor, was hostile to Helm's involvement in protected activity.

#### 4. Motivation

The Respondent maintains that its denial of Helm's request for leave was based upon the Library's need for maximum staffing in December of 1981. The large backlog of work in the library, the Respondent asserts, together with the shortage of staff due to vacation schedules and leaves, mandated that Bielmeier deny the

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9/ the Complainant to explain its reasons for not previously producing this evidence. In making the argument in brief only, the Respondent is essentially requesting that inferences be drawn from facts outside the record. The Examiner is limited to the record in making his Findings and Conclusions (ERB 12.06 (2) Wis. Adm. Code) and will not go beyond it in this case.

Even if the Examiner were to take administrative notice of the entire transcript in the former proceeding, thereby presumably taking notice of the lack of any reference to Mitchell's statement by the Complainant's witnesses, any adverse inference drawn from that lack of information would necessarily be tempered by the possibility that the Complainant in that case may have had plausible strategic or practical reasons for not presenting the evidence at that time. Since the Respondent waited until after the hearing to attempt to raise this issue, there is no opportunity for the Examiner to weigh the competing possible explanations and determine the true significance of the Respondent's allegation.

The Examiner would note that Wegener's credibility as a witness in this proceeding was very impressive. Even assuming for the sake of argument that notice were taken of the questions never asked in prior proceedings, without affording the Complainant an opportunity to offer explanatory testimony, the Examiner would still credit Wegener's testimony over that of Weed and Mitchell on the basis of relative demeanor and motive. Thus the Examiner declines the invitation of the City to administratively notice the record of the prior complaint cases involving the Library and the Complainant (Respondent's brief, at page 20, fn. 37). Such notice would be prejudicial to the Complainant because of the Respondent's delay in raising the issue until after the hearing, and would lack substantial probative value in light of the credibility findings made herein.

10/ The Examiner's conclusion that the Respondent was hostile to Helm's protected activity is premised upon:

- 1) The Mayor's statement in Fall of 1981 that he was going to get rid of Farnham and Helm; and
- 2) The circumstances surrounding Helm's request for leave and its denial (Section III(A)(4), infra).

In the Examiner's view, either of the above, standing alone, would support a conclusion that the Respondent was hostile to Helm's activity.

leave request. The Complainant asserts that the reasons put forward by the Respondent are pretextual, and that the true motive for denying Helm's leave was hostility to her protected activity and a certainty that she would choose motherhood over work if forced to decide between the two.

Initially the Examiner would note that the dispute between the Respondent and the Complainant over whether Helm was entitled as a matter of right to an unpaid leave misses the mark. The Respondent argues that leave without pay is a privilege and not a right, and may therefore be denied. The Complainant notes that the written policy of the Respondent provides that . . . "leave of absence without pay will be granted for acceptable reasons . . ." and argues that the use of the word "will" rather than "may" requires granting of the leave, making it a right.

The Respondent has a written policy providing for unpaid leaves of absence, and has allowed at least five employees to take such leaves. Only one employee has previously been denied a requested unpaid leave. Plainly, Helm had a right to request such a leave and have her request considered on its merits. The condition of employment which is alleged to have been the focus of the discrimination complained of herein is not the right to the leave itself, but the right to a decision granting or denying the request without consideration of Helm's protected activity.

The Examiner concludes, on the basis of the record as a whole, that the reasons advanced by the City are a pretext. The following points specifically lead to this conclusion:

a. Bielmeier's November 16 Remarks.

Helm testified that Bielmeier seemed pleased for her when she announced on November 15 that she might be adopting a child. Bielmeier indicated that there would be no problem with a leave of absence, although she would first have to check with the Mayor. Bielmeier confirmed that her initial reaction was very positive, but stated that upon later reflection she realized that her manpower needs would not allow for granting the leave. Bielmeier's testimony therefore puts the denial to a neutral decision based upon her minimum required staffing for the delivery of services - certainly a legitimate concern for the Director of the Library. Helm further testified, however, that in advising her that her request was denied on November 16, Bielmeier stated that she hoped Helm understood that the decision was not Bielmeier's doing. 11/ Helm responded that she would like to think that it was not, to which Bielmeier replied that after all the years they'd worked together, Helm should know that it wasn't Bielmeier's decision. 12/ Although Bielmeier testified at length about the circumstances surrounding her denial of Helm's request, and the reasons for the denial, she never denied making the statements Helm attributed to her nor did she offer any explanation for these statements. These statements are therefore un rebutted on the record, and the Examiner has found that the statements were made to Helm by Bielmeier on November 16th (Finding of Fact No. 10).

Bielmeier's denial of responsibility is at odds with the Respondent's theory of the case. If Helm's leave was denied because Bielmeier judged her presence critical to Library operations, then Bielmeier, as the person in charge of the Library, should hardly have disclaimed responsibility for the decision. The essence of the Respondent's version of events is that Bielmeier independently denied Helm's leave for valid business reasons, and if this were the case Bielmeier's disclaimer would make no sense. The statements made by Bielmeier are more consistent with the Complainant's theory that the motive for denying Helm's request was the Mayor's desire to retaliate for her union activity. This would explain why the decision was made by the Mayor rather than Bielmeier, a fact which the Examiner infers from sequence of events (Bielmeier's discussion with the Mayor being the sole intervening event between her discussion with Helm on the 15th and her disclaimer on the 16th).

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11/ Transcript, page 46 (Testimony of C. Helm).

12/ Transcript, page 47 (Testimony of C. Helm).

It may be, of course, that Bielmeier simply wished to deflect Helm's resentment and disappointment by blaming another party for the decision. Were that the case, Bielmeier could have made that explanation at the hearing. Instead, she offered no explanation and the Examiner must assume that her words, as reported by Helm in her presence, signified exactly what they appeared to signify - that the decision to deny Helm's request for leave was not based upon Bielmeier's assessment of manpower needs at the Library, but on other considerations attributable to the Mayor.

b. The Advertisement for a Replacement

Bielmeier testified that she placed an advertisement in the Milwaukee papers seeking part-time professional librarians within a week of denying Helm's request for an unpaid leave of absence. 13/ Bielmeier testified that this advertisement was placed because she was unsure whether Helm would accept the decision to deny her leave sufficient to carry through on the adoption, or would instead take the required time off and thus leave the Library's employment. Further she was concerned that, in either event, Helm might find the pressures of motherhood too great and be unable to continue as a full-time employee. She therefore determined to "refresh" the Library's personnel files.

Bielmeier's decision to place an ad for potential replacements within a week of Helm's request may, as the City suggests, be simply cautious management. The rapidity with which Bielmeier acted, however, is suspicious in light of the fact that Helm had not at that point given any indication that she might be considering leaving the Library's employ. Granted, Helm had stated that she did not know what her plans were after her vacation expired, but this was immediately after she first learned that her leave request would not be granted. Her uncertainty at that time is hardly surprising. The City's apparent eagerness to secure replacements for an employee whom they had no solid basis to believe would be leaving is not, standing alone, conclusive as to motive. In conjunction with the other factors discussed herein, however, it does reinforce the Examiner's conclusion that the City acted out of motives other than simple business considerations.

c. The Replacement of Helm With Two Part-Time Librarians

As discussed in Section b, supra, the City determined that it would replace Helm by hiring part-time staff. Two part-timers were in fact hired after Helm's termination. The first started work on December 21, 1982 and the other on January 3, 1983. Given the fact that Helm's requested leave was to have ended with the start of work on January 3, the City was able to obtain perhaps an additional nine days of part-time work by replacing Helm. Moreover, the two people hired to replace Helm both required training in the Library's cataloging system, at which Helm was proficient. This involved having Wegener devote her time to training, rather than working. None of this reflects an overriding concern with reducing the backlog of work at the Library, as it could only serve to worsen it. 14/

The Library's response to the backlog of work was to replace a competent professional librarian, skilled in cataloging, with two part-time employees whose lack of cataloging skills compelled Wegener to take on additional cataloging and training work. While this may all have simply been the result of poor planning and happenstance, the fact that the decision to replace Helm led to the very evil the Respondent was purportedly attempting to avoid undercuts their explanation of the decision. All this is particularly troubling when considered along with the puzzling reluctance of any of the actors (Helm included) to clearly discuss the alternatives for accommodating Helm's desire to adopt with the Library's staffing needs. While the Respondent makes much of Helm's failure to volunteer assurances and suggestions, nowhere in the record is there an indication that the Respondent explored possible accommodations, such as Helm working part-time (if indeed she would refuse to work full-time - a fact not established by anyone in this

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13/ Transcript, page 132 (Testimony of S. Bielmeier).

14/ Transcript, pages 158-159 (Testimony of M. Wegener).



proceeding). The Examiner does not suggest that the Respondent had an affirmative obligation to make such offers to Helm, but it seems an obvious approach that more rationally addresses the supposed concerns of the Respondent than that ultimately adopted. In summary, the course of action taken by the Respondent is not consistent with their expressed desire to avoid a shortage of skilled manpower. Had the requested leave been granted, the Respondent would have been in a better position to deal with its backlog than it was as a result of denying the leave. 15/

#### d. The Backlog

As has been extensively discussed, the Respondent alleges that it denied Helm's request for leave because of a large backlog of work in the Library, and the need to address that backlog in December of 1982. Bielmeier testified, however, that she had directed the Library staff to use all of their vacation time by the end of the year so that a concerted effort could be started on the backlog in January. She further testified that the eventual elimination of the backlog in Summer of 1982 was due to the introduction of improved management software for the computer system. This software was obtained in the first quarter of 1982, although they had anticipated receiving it in 1981. 16/ If the key to the elimination of the backlog was the introduction of the new software, which they knew to be coming either in late 1982 or early 1983, and the major effort to eliminate the backlog was scheduled for January, February and March, the absence of Helm in December for some fifteen days in addition to her already scheduled vacation would appear to bear only a tenuous connection to the backlog. In considering the impact of the backlog on the Respondent's denial of Helm's leave request, the Examiner is particularly influenced by the fact that the backlog was a problem of long standing in the Library, dating back to the beginning of computerization in May of 1981. 17/ Although the problem was more pronounced in the last six months of 1982, the Library had nonetheless granted unpaid leave to two other employees (Grimstad and Nuenfeldt) during the pendency of the backlog. Thus, the backlogging of work, while a serious problem for the Library, does not appear to have been a particular crisis in December but rather the normal state of affairs.

In summary, the Examiner concludes that the reasons advanced by the Respondent for denying Helm's leave are pretextual. Most important to this conclusion, and sufficient in and of itself, is the statement by Bielmeier that the denial was not her doing. Bielmeier was the official responsible for the operation of the Library and would have determined the staffing necessary to handle the workload, including the backlog. Independently supporting the conclusion that the explanations proffered by the Respondent are pretext are the total circumstances surrounding the leave, including the fact that the Respondent's reaction to Helm's absence was inconsistent with a need for reducing the backlog, the efforts to replace her before she had given them reason to believe that she would leave, and the status of the backlog as a normal condition rather than a crisis in the Library during 1982.

#### B. Interference

The Examiner has concluded that the Respondent discriminated against Christina Helm when it denied her request for unpaid leave for adopting a child in late 1982. This necessarily leads to a conclusion that the Respondent has committed a derivative act of interference. The Complainant, however, also alleges that the Respondent's elimination of the last remaining member of the Union's bargaining committee constituted an independent act of coercion and interference. The Complainant further suggests that the Respondent's hiring of two part-time employees outside of the bargaining unit to replace Helm compounded the interference.

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15/ Transcript, pages 141-142 (Testimony of S. Bielmeier).

16/ Transcript, pages 141-142 (Testimony of S. Bielmeier).

17/ Transcript, page 141 (Testimony of S. Bielmeier).

The Complainant has cited no authority for the proposition that replacing a member of the Union's bargaining committee, absent animus, constitutes interference. The Complainant correctly notes that motive is not a necessary element for establishing an independent violation of Section 111.70(3)(a)1, as any action which reasonably tends to interfere with the exercise of employee rights will violate the Section. That rule of law is not, however, a shield preventing an Employer from taking legitimate steps to manage its workforce. If the Respondent had legitimate reasons for removing Ms. Helm from the workforce, such removal would not necessarily constitute interference. Interference would result if the action might be reasonably construed to constitute a promise of benefit or threat of reprisal. 18/ Legitimate discharge of the sole remaining member of the Union's bargaining team might inconvenience the Union, but would not, standing alone, tend to interfere with or coerce other employees. It is the fact of anti-union discrimination which leads to the conclusion here that the Respondent interfered with Helm's rights and coerced other employees in the exercise of their rights. The Examiner has accordingly dismissed the portion of the complaint alleging a separate and independent act of interference in violation of Section 111.70(3)(a)1.

#### IV. REMEDY

##### A. Reinstatement and Backpay

The Examiner has concluded that the Respondent discriminated against Christina Helm when it denied her request for leave without pay in November of 1982. The impact of the City's decision to deny the leave was Helm's "voluntary resignation" 19/ from the library staff. In crafting remedies, the Examiner is to order that relief which is necessary to effectuate the purposes of MERA. In the instant case, the Examiner is persuaded that an order of reinstatement and backpay is necessary to remedy the effects of the Respondent's discrimination, since the natural and foreseeable consequence of denying Helm's request for leave was that she would be absent without leave and her employment terminated. That the Respondent contemplated the implications of its refusal and concluded that termination would be the result is demonstrated by the testimony of Bielmeier 20/ and the fact that the Library advertised for her position before Helm left on her scheduled vacation. Even in the absence of this express evidence that the Respondent knew of the likely consequences of its refusal, the Examiner would conclude that the Respondent could reasonably foresee that an employee faced with the choice between adopting and reporting for work would choose the former. The restoration of the status quo ante therefore requires that the Respondent immediately offer Helm reinstatement and back pay from the date she would have returned from her unpaid leave, January 3, 1983. 21/

##### B. Interest on Backpay

The Commission and its Examiners are obligated to award interest on backpay awards at the statutory rate in effect at the time of violation. 22/ The Examiner

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18/ City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

19/ Jt. Exhibit 2 (Letter dated November 24, 1982 from Bielmeier to Helm).  
C. Attorney's Fees

20/ Transcript, pages 117-119, 121, 125-126 (Testimony of S. Bielmeier).

21/ Bielmeier suggested in her testimony that Helm could have been reinstated on December 10, 1982 had she requested it during her visit to the Library with her new child. Transcript, page 124. This was not communicated to Helm in any way on that occasion. Helm was told that her final paycheck, including 11/12ths of her earned vacation was going to be mailed to her on the following Monday. Inasmuch as Helm had already been informed that her employment would be terminated, this unspoken offer of reinstatement cannot serve to mitigate the Respondent's liability for backpay.

22/ Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83).

therefore orders interest on the payment of backpay to Helm at the rate of 12% per annum. 23/

C. Attorney's Fees

The Complainant requests an award of attorney's fees. No argument is advanced in the Complainant's brief for such fees and there is no basis in the record for awarding attorney's fees. 24/

D. Cease and Desist

The Examiner believes that a cease and desist order against the Respondent, prohibiting further discrimination against Helm with regard to her hiring, tenure and other terms and conditions of employment is necessary to effectuate the purposes of the Act.

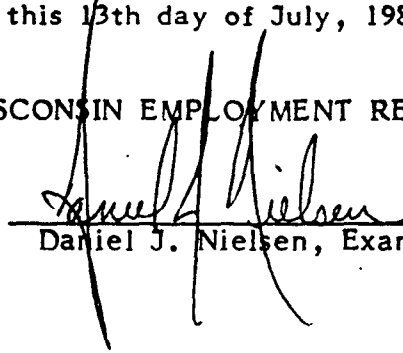
E. Notification to Other Employees

Inasmuch as the Respondent's discrimination against Helm for her protected activity inevitably will tend to coerce and intimidate other employees in the exercise of their protected rights under Sec. 111.70(2) MERA, the Examiner concludes that the posting of a notice to all employees, advising them that the Respondent will not discriminate against employees for, nor interfere with their right to, exercise such protected rights, is necessary to effectuate the purposes of the Act.

Dated at Madison, Wisconsin this 13th day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Daniel J. Nielsen, Examiner

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23/ Section 814.04(4), Wis. Stats. (1982).

24/ Madison Metropolitan School District, sub. nom. MTI v. WERC, Dec.  
No. 16471-D, 115 Wis.2d 623 (Ct. of Appeals, Dist. IV, 1983).